COLLATERAL ATTACK ON INCORPORATION.

A. DE FACTO CORPORATIONS.

Dedicated to Professor Langdell.

A, B, and C wished to engage in the business of retailing ice. By statute it was provided that if any three persons did specified acts, they acquired the privilege of engaging, as a corporation, in any designated business. A, B, and C, intending in good faith to avail themselves of the provisions of this statute, did all the acts required except one. By inadvertence, no statement of the amount of capital to be employed was made in the certificate of incorporation. Believing that they had received the franchise of the state to act as an artificial person, they assumed, as such person, to engage in the designated business for a number of months. They employed D, and he, while delivering ice and solely by reason of his own negligence, injured E. The alleged corporation has become insolvent, and E seeks to establish that A, B, and C are personally responsible for the tort to him.

"But," say A, B, and C, "although we were not a *de jure* corporation, clearly we were a *de facto* corporation. It is for the state to grant the franchise to be a corporation, and is it not therefore for the state alone to complain if persons usurp that franchise? Is it not well settled that, except as against the state, a *de facto* corporation is just as good as a *de jure* corporation? Has it not been written that the existence of a corporation shall not be attacked collaterally?" It will be the attempt of this article to meet these questions.

The doctrine of *de facto* public officers was established at a comparatively early date. Suppose that a justice of the peace has authority to issue warrants of distress. The law has created the office. A is generally reputed to be entitled to it, and is openly exercising its powers. He issues a warrant, and B, believing that A is a justice of the peace, acts under the warrant and distrains the goods of C. C sues B for the trespass, and shows that A, owing to his failure to take a certain oath, was

not authorized to act as a justice. The courts protect B.[1] It is not to be expected that those who have occasion to deal with a person exercising the powers of a public office shall examine with particularity into all the circumstances affecting his appointment (or election) and qualification, particularly as he is under no duty to disclose the pertinent evidence. If persons dealing with those actually exercising the powers of public offices were held to do so at their peril, the business of the community could not be conducted with reasonable despatch. Moved by these urgent considerations of public policy, the courts have felt themselves justified in giving, for the benefit of a person dealing in good faith with a *de facto* public officer, the same effect to his acts as would be given to the acts of a *de jure* officer.

Is the law of corporations analogous? The owner of land purports to grant it to the M corporation, and M, the alleged corporation, to grant it to A. A brings ejectment against X, a stranger to the title. If M was a *de facto* corporation, A should be allowed to prevail. A large and increasing proportion of business transactions involve the acceptance of a title purporting to pass (or to have passed) from a corporate grantor or vendor. The considerations of public policy moving the courts to facilitate such transactions may not be so urgent as those respecting transactions with public officers, but they have great force. And the courts hold that a *de facto* corporation may be a conduit of title.[2]

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[1] Margate Co. *v.* Hannam, 3 B. & Ald. 266. See also Leak *v.* Howel, 2 Cro. Eliz. 533.

[2] Denver *v.* Mullen, 7 Colo. 345, 358 (lessees of a *de facto* corporation protected); Duggan *v.* Colorado Co., 11 Colo. 113 (mortgagee protected); Georgia Co. *v.* Mercantile Co., 94 Ga. 306 (mortgagee protected); Finch *v.* Ullman, 105 Mo. 255 (grantee maintained ejectment); Crenshaw *v.* Ullman, 113 Mo. 633; Lusk *v.* Riggs, 102 N. W. Rep. 88 (Neb.); Saunders *v.* Farmer, 62 N. H. 572 (grantee maintained a writ of entry); Hackensack Co. *v.* DeKay, 36 N. J. Eq. 548, 559 (mortgagee protected); Society Perun *v.* Cleveland, 43 Oh. St. 481 (grantees protected, although state had maintained *quo warranto* proceedings against the *de facto* corporation).

See also the reasoning of the court in Quinn *v.* Shields, 62 Ia. 129, 139; Keene *v.* Van Reuth, 48 Md. 184, 193; East Norway Church *v.* Froislie, 37 Minn. 447, 450; Elizabethtown Co. *v.* Green, 49 N. J. Eq. 329, 337; American Co. *v.* Heidenheimer, 80 Tex. 344, 348; Ricketson *v.* Galligan, 89 Wis. 394. In Fay *v.* Noble, 7 Cush. (Mass.) 188, the plaintiff did not ask for relief on this ground.

A fortiori, a court may hold that slight evidence of due incorporation is sufficient to make a *prima facie* case (see note 15). See Hamilton *v.* McLaughlin, 145 Mass. 20; Tarpey *v.* Deseret Co., 5 Utah 494.

If the defendant has dealt with the *de facto* corporation (under which plaintiff claims) as a corporation, this precludes him from attacking its existence (see note 33). Farns-

These doctrines do not rest upon any principle of estoppel. There is no basis for any argument addressed *ad hominem*, — the plaintiff who sued because his goods were distrained had never dealt with the alleged justice of the peace, and the defendant who resisted the attempt to eject him had never dealt with the alleged corporation. The doctrines must find their support in considerations of public policy.[3]

The doctrine of *de facto* public officers is applied only for the benefit of persons dealing with such officers. It is in no wise remedial to the *de facto* officer himself. He cannot enforce a right incident to the office,[4] and if he assumes to do an act which would be a tort were it not for the protection of the office, he is, notwithstanding that he acted in the best of faith, liable for the tort.[5]

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worth *v.* Drake, 11 Ind. 101; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Jones *v.* Hale, 32 Ore. 465; Douglas County *v.* Bolles, 94 U. S. 104 (a municipal corporation is bound by bonds issued for stock in a *de facto* railroad corporation and sold by the railroad corporation); County of Leavenworth *v.* Barnes, 94 U. S. 70; Andrews *v.* National Foundry, 77 Fed. Rep. 774; Toledo Co. *v.* Continental Trust Co., 95 Fed. Rep. 497. See also Sherwood *v.* Alvis, 83 Ala. 115; Goodrich *v.* Reynolds, 31 Ill. 490; Mitchell *v.* Deeds, 49 Ill. 416; Snyder *v.* Studebaker, 19 Ind. 462; Brown *v.* Phillipps, 16 Ia. 210; Franklin *v.* Twogood, 18 Ia. 515, 524; Ragan *v.* McElroy, 98 Mo. 349; Briar Co. *v.* Atlas Works, 146 Pa. St. 290; County of Macon *v.* Shores, 97 U. S. 272; Close *v.* Gleenwood Cemetery, 107 U. S. 466; Beekman *v.* Hudson River Co., 135 Fed. Rep. 3.

A fortiori, the fact of such dealing may properly be held to make a *prima facie* case of incorporation. See Williams *v.* Cheney, 3 Gray (Mass.) 215; Topping *v.* Bickford, 4 Allen (Mass.) 120; Den *v.* Van Houten, 10 N. J. L. 270; Ryan *v.* Martin, 91 N. C. 464. *Cf.* Hungerford Bank *v.* Van Nostrand, 106 Mass. 559.

On the question of good faith, see note 13. The grantee from a *de facto* corporation should be protected, if he has acted in good faith, even though the attempt to form the corporation was not made in good faith. Duggan *v.* Colorado Co., 11 Colo. 113, 117; Elizabethtown Co. *v.* Green, 49 N. J. Eq. 329, 337. *Cf.* Doyle *v.* Mizner, 40 Mich. 160. And it is submitted that the courts should refuse to inquire whether persons asserting a title derived from a *de facto* corporation had notice of the defective organization at the time of their purchase, and that therefore a *de facto* corporation should be held to have a marketable title. It was so held in Lancaster *v.* Amsterdam Co., 140 N. Y. 576, 583. (It may also be noted that the courts will protect the grantee of a corporation, even though the acquisition of the land by the corporation was *ultra vires*, and the grantee is charged with constructive notice of the powers of the corporation.) Where the sole question before the court is as to the capacity of an alleged corporation to be a conduit of title, a wide scope may very properly be given to the *de facto* doctrine.

[3] Consideration is omitted of the questions, (*a*) whether the *de facto* doctrine is available to the state in criminal prosecutions, and (*b*) whether collateral attack may ever be made upon the existence of a *de facto* municipal corporation.

[4] Dolan *v.* New York, 68 N. Y. 274.

[5] Short *v.* Symmes, 150 Mass. 298.

The question therefore becomes this: is there any doctrine of *de facto* corporations (where there is no basis for the argument *ad hominem*) which goes beyond the analogy of the doctrine of *de facto* public officers, and is remedial to the associates themselves?

Some rights may be lawfully acquired forthwith by mere appropriation. Thus in the case of wild animals, of abandoned chattels, of land made vacant by the death of a tenant *pur autre vie*. But no court has ever held, or intimated, that the franchise to be a corporation may be lawfully acquired forthwith by mere appropriation.

Many rights may be lawfully acquired by appropriation continued for a considerable lapse of time, under the operation of statutes of limitation, or by force of analogies from such statutes, or by force of artificial presumptions of a lost grant. The franchise to be a corporation may be thus lawfully acquired.[6]

If A is in the actual possession of property belonging to X, then, even though A obtained such possession wrongfully, B, who has himself no right to the property, must not disturb A's possession. Such a rule works no injustice to B, and tends to preserve the public peace.

But does the law ever permit A, who has usurped a right, to require B, an innocent stranger, to submit to an affirmative assertion of such right against him? The propositions of the preceding three paragraphs are no authority for such a doctrine.

A deed is placed in escrow to be delivered to A when A executes a bond to support B. A never executes a bond, but he in fact supports B and assumes in good faith to act as owner of the property. He does not thereby acquire title.[7]

A father leaves a child with a charitable institution. The institution has a statutory right, upon the performance of specified acts, to apprentice the child. Most, but not all, of the specified acts are performed, and the institution assumes to apprentice the child to the defendant, who believes he has become its master. If the father wishes to resume the support of the child, it is difficult to see how the "*de facto* master" can successfully resist him.[8]

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[6] Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319, 326; King *v.* Beardwell, 2 Keb. 52; Crafts of Mercers *v.* Hart, 1 C. & P. 113. See also State *v.* Bailey, 19 Ind. 452.

[7] See Hinman *v.* Booth, 21 Wend. (N. Y.) 267.

[8] The case put in the text was suggested by People *v.* Weissenbach, 60 N. Y. 385. It was there held that the failure of the respondent to give a bond might give the child

A and B went through a ceremony which they believed to constitute them man and wife. But the person assuming to officiate had no power to marry and (under the laws of the state where the ceremony was performed) no legal marriage was effected. A sues C for alienating the affections of B, his wife. If C had alienated the affections of B, A may well, in some proper form, be given redress against him. But how can a man, who has not been married, maintain an action for alienating the affections of his wife?

A dies. B assumes, without right, to act as his executor. Creditors of A may take him at his assertion; debtors of A, paying him in good faith, may perhaps be protected; but B himself cannot maintain an action to enforce any right belonging to the estate.[9]

We have already seen that a *de facto* public officer cannot maintain an action to enforce a right incident to the office, or avail himself of the protection of the office against liability for a tort.[10]

Possibly a disseisor was allowed affirmatively to assert rights incident to the ownership of the land, but this is not clear. In any event, the conditions of society are now so different from those prevailing when the doctrine of disseisin was established and developed that, it is submitted, the reasons for doctrines remedial to disseisors have ceased to exist, except so far as they involve the policy of quieting titles after a lapse of time. Analogies from the old law of disseisin would be as unsafe as analogies from the old law of tortious conveyances. It may, moreover, be added that the doctrine of disseisin itself seems to have been established primarily for the benefit of the lord, and not for the benefit of the disseisor.

If A has made an expenditure in good faith, believing that he was thereby obtaining a legal right, and he did not obtain the right, it may well be that he is a proper object of sympathy. But is this sympathy to be carried to the extent of forcing B, himself quite innocent of any wrong-doing, to submit to an exercise of this right by A? What end of justice is thereby achieved? If A has a certain right, he is not responsible for damage done to E; if he does not have it, he is responsible. How can he be said to have acquired the right, when he has not performed the conditions

a right to avoid the indentures, but that the father could not take advantage of this right in the child. See note 12.

[9] 1 Williams, Executors, 10 ed., 695.

[10] See notes 4 and 5.

precedent to its acquisition, but has merely performed most of these conditions, and acted upon the mistaken belief that he had performed all? Is he to be allowed to lift himself by his own boot-straps? It is fundamental that, while an equity may be swept away for the benefit of a person who has made an expenditure in good faith, a legal gap will not be bridged.

If then (to return to the case put in the opening paragraph) A, B, and C are allowed to protect themselves from personal liability for the tort done to E, on the ground that, in appointing D as agent, they were exercising a right obtained from the state to act as an artificial person, this must rest upon some doctrine peculiar to the law of corporations.

Courts have frequently used the expression that the existence of a corporation cannot be attacked collaterally. Suppose the legislature grants a charter to the X corporation, and provides therein that in case a certain act is not done within a time specified the charter shall be void. The act is not done within the time specified, and thereafter X sues A. A seeks to defend on the ground that X, by its failure to do the act, ceased to be a corporation. But, although the word "void" was used, the courts would ordinarily construe this to mean "voidable, at the election of the state."[11] If such construction is adopted, it follows that, until the state has exercised its option to declare the charter void, X still lives. A does not represent the state, and cannot enforce the state's option. It is well settled, therefore, that no collateral attack can be made upon the existence of a corporation by reason of facts justifying the state in declaring the corporate life forfeited.[12]

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[11] Brown *v.* Wyandotte Co., 68 Ark. 134; Atchafalaya Bank *v.* Dawson, 13 La. 497; Matter of New York Co., 148 N. Y. 540. *Cf.* Brooklyn Co. *v.* Brooklyn, 78 N. Y. 524.

[12] Harris *v.* Nesbit, 24 Ala. 398; Bloch *v.* O'Conner Co., 129 Ala. 528; Hammett *v.* Little Rock Co., 20 Ark. 204; Mississippi Co. *v.* Cross, 20 Ark. 443; West *v.* Carolina Co., 31 Ark. 476; Searcy *v.* Yarnell, 47 Ark. 269; Union Co. *v.* Rocky Mountain Bank, 1 Colo. 531; Spencer *v.* Champion, 9 Conn. 536, 543; Kellogg *v.* Union Co., 12 Conn. 7; Pearce *v.* Olney, 20 Conn. 544, 556; Pahquioque Bank *v.* Bank of Bethel, 36 Conn. 325; Young *v.* Harrison, 6 Ga. 130; Union Branch Co. *v.* East Tennessee Co., 14 Ga. 327; Atlanta *v.* Gate City Co., 71 Ga. 106; Wilmans *v.* Bank of Illinois, 6 Ill. 667; Thomas *v.* South Side Co., 218 Ill. 571; John *v.* Farmers' Bank, 2 Blackf. (Ind.) 367; Brookville Co. *v.* McCarty, 8 Ind. 392; Logan *v.* Vernon Co., 90 Ind. 552; Barren Creek Co. *v.* Beck, 99 Ind. 247; Carey *v.* Cincinnati Co., 5 Ia. 357; Bank of Gallipolis *v.* Trimble, 6 B. Mon. (Ky.) 599; Atchafalaya Bank *v.* Dawson, 13 La. 497; State *v.* Fagan, 22 La. Ann. 545; Penobscot Corporation *v.* Lamson, 16 Me. 224; Hamilton *v.* Annapolis Co., 1 Md. Ch. 107; University of Maryland *v.* Williams, 9 Gill

But this doctrine has, save by confusion, nothing to do with the doctrine of *de facto* corporations. It is concerned not with the manner in which corporate life may be gained, but with the manner in which corporate life may be lost. There is no defect whatever in the formation of the corporation; no one questions but

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& J. (Md.) 365; Planters' Bank *v.* Bank of Alexandria, 10 Gill & J. (Md.) 346; Musgrave *v.* Morrison, 54 Md. 161; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 371; Cahill *v.* Kalamazoo Co., 2 Doug. (Mich.) 124; Montgomery *v.* Merrill, 18 Mich. 338; Toledo Co. *v.* Johnson, 49 Mich. 148; Bohannon *v.* Binns, 31 Miss. 355; Bank of Missouri *v.* Merchants' Bank, 10 Mo. 123; Bank of Missouri *v.* Snelling, 35 Mo. 190; State *v.* Carr, 5 N. H. 367, 370; Peirce *v.* Somersworth, 10 N. H. 369; Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171; New Jersey Co. *v.* Long Branch Commissioners, 39 N. J. L. 28; Jersey City Co. *v.* Consumers Gas Co., 40 N. J. Eq. 427; Elizabethtown Co. *v.* Green, 46 N. J. Eq. 118; West Jersey Co. *v.* Camden Co., 52 N. J. Eq. 452, 464; Merrick *v.* Van Santvoord, 34 N. Y. 208, 222; Matter of N. Y. Elevated Co., 70 N. Y. 327; Matter of Kings County Elevated Co., 105 N. Y. 97; Matter of Cutchogue, 131 N. Y. 1 (see also 46 Barb. (N. Y.) 361; 6 Cow. (N. Y.) 23; 5 Duer (N. Y.) 676; 7 How. Pr. (N. Y.) 476; 4 N. Y. Supp. 177; 3 Sandf. Ch. (N. Y.) 625, 652; 23 Wend. (N. Y.) 254. *Cf.* 19 Johns. (N. Y.) 456; Webb *v.* Moler, 8 Oh. 548; Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190; Coil *v.* Pittsburgh College, 40 Pa. St. 439; Twelfth-St. Co. *v.* Philadelphia Co., 142 Pa. St. 580, 593; Hinchman *v.* Philadelphia Road, 160 Pa. St. 150; Gas Co. *v.* Downingtown, 193 Pa. St. 255; Olyphant Co. *v.* Olyphant, 196 Pa. St. 553; Windsor Co. *v.* Carnegie Co., 204 Pa. St. 459; LaGrange Co. *v.* Rainey, 7 Cold. (Tenn.) 420; Anderson *v.* Railroad, 91 Tenn. 44; Connecticut Co. *v.* Bailey, 24 Vt. 465; Crump *v.* U. S. Co., 7 Grat. (Va.) 352; Moore *v.* Schoppert, 22 W. Va. 282; Lumber Co. *v.* Ward, 30 W. Va. 43; Mackall *v.* Chesapeake Co., 94 U. S. 308; Van Wyck *v.* Knevals, 106 U. S. 360 (see also 28 Fed. Cas. 1153; 5 Sawy. (U. S.) 44); Robinson *v.* London Hospital, 10 Hare 19.

A private individual cannot institute *quo warranto* proceedings to have the charter of a corporation declared forfeited. North *v.* State, 107 Ind. 356; Commonwealth *v.* Union Co., 5 Mass. 230; Attorney General *v.* Adonai Corporation, 167 Mass. 424; State *v.* Paterson Co., 21 N. J. L. 9; Commonwealth *v.* Farmers' Bank, 2 Grant (Pa.) 392; Western Pa. Company's Appeal, 104 Pa. St. 399.

If the legislature is induced by fraud to pass a special act of incorporation, the corporation comes into being, and the fraud is only a cause of forfeiture by the state. Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 370. Similarly, if the legislature has by a special or general law authorized a designated official or body to issue a charter or a certificate (which is made conclusive evidence of incorporation) upon the performance of conditions precedent, and the official or body is induced by fraud to issue such charter or certificate. Rice *v.* Bank of Commonwealth, 126 Mass. 300 (by Mass. L. 1903, c. 437, § 12, the certificate of the Secretary of State "shall have the force and effect of a special charter"); Nat'l Bank *v.* Rockefeller, 195 Mo. 15, 42 (whether this was a sound construction of the statute in question, *quære*); Centre Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140, 1 Pen. & W. (Pa.) 426, 431; Travaglini *v.* Societa Italiane, 5 Pa. Dist. 441; German Insurance Co. *v.* Strahl, 13 Phila. 512. See also Pattison *v.* Albany Ass'n, 63 Ga. 373; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537; Wells Co. *v.* Gastonia Co., 198 U. S. 177, 185; Pilbrow *v.* Pilbrow's Co., 5 C. B. 440, 471, 472 (commenting on § 18 of the Companies Act of 1862). Similarly, if the designated official or body is induced by fraud to do an act the performance of which is one of the conditions precedent to incorporation. Duke *v.*

that it came into existence; the only question is whether it still continues in existence. The use of this doctrine to support the contention that, if certain persons assume to have the right to act as a corporation, all but the state must submit quietly to their exercise of such usurped right, arises, it is not too much to say, from a profound misconception.

Have I exposed myself to the retort courteous? Perhaps the misconception is in supposing that any one does, deliberately,

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Cahawba Co., 16 Ala. 372; Litchfield Bank *v.* Church, 29 Conn. 137, 148; Jones *v.* Dana, 24 Barb. (N. Y.) 395; Tar River Co. *v.* Neal, 3 Hawks (N. C.) 520.

Wherever the legislature has authorized the formation of a corporation upon the performance of certain conditions precedent, the courts must necessarily determine whether the legislature intended to require a certain mental state in the corporators as one of these conditions. Considering the difficulty of proof on such a point, the courts may well incline against such a construction of the law. Thus if the legislature has authorized persons to form a corporation by filing a certain certificate, and the certificate filed contains the required matter and the statements therein are true, a corporation is formed, even though the corporators secretly intend to make an unlawful use of the corporation so formed. See Importing Co. *v.* Locke, 50 Ala. 332, 334; Niemeyer *v.* Little Rock Ry., 43 Ark. 111, 120; Aurora Co. *v.* Lawrenceburgh, 56 Ind. 80, 87; Lincoln Ass'n *v.* Graham, 7 Neb. 173; Attorney General *v.* Stevens, Saxt. Ch. (N. J.) 369, 378; National Docks Co. *v.* Central Railroad, 32 N. J. Eq. 755, 759; Attorney General *v.* American Tobacco Co., 55 N. J. Eq. 352, 369; aff. 56 N. J. Eq. 847; Buffalo Co. *v.* Hatch, 20 N. Y. 157, 159; Windsor Co. *v.* Carnegie Co., 204 Pa. St. 459, and cases cited. See also Terhune *v.* Midland Co., 38 N. J. Eq. 423; Wellington Co. *v.* Cashie Co., 114 N. C. 690; Cochran *v.* Arnold, 58 Pa. St. 399, 405. *Cf.* cases cited below. On the formation of a corporation and transfer of property thereto with intent to give the federal courts jurisdiction, see Irvine Co. *v.* Bond, 74 Fed. Rep. 849.

Although fraud in procuring a charter is only a cause of forfeiture, fraud by the associates may prevent incorporation. Thus (to put a plain case) where the legislature requires, as a condition precedent, that a certain subscription be made "in good faith." Whether, when fraud prevents incorporation, collateral attack will be permitted upon the existence of the alleged corporation is not a question within the law of *de facto* corporations (see third paragraph of note 13). But there is no sweeping rule that such attack may never be made. Christian Co. *v.* Fruitdale Co., 121 Ala. 340; Carey *v.* Cincinnati Co., 5 Ia. 357; Montgomery *v.* Forbes, 148 Mass. 249; Cleaton *v.* Emery, 49 Mo. App. 345; Davidson *v.* Hobson, 59 Mo. App. 130; Farnham *v.* Benedict, 107 N. Y. 159, 169; Booth *v.* Wonderly, 36 N. J. L. 250; Hill *v.* Beach, 12 N. J. Eq. 31; Jersey City Co. *v.* Dwight, 29 N. J. Eq. 242 (the learned vice-chancellor who decided this case assumed, 46 N. J. Eq. 116, that it could not stand with National Docks Co. *v.* Central Co., 32 N. J. Eq. 755. But see 49 N. J. Eq. 329, 335); Elizabethtown Co. *v.* Green, 49 N. J. Eq. 329 (by the five dissenting judges. Whether the majority was opposed on this point does not appear. The decision is explained in 52 N. J. Eq. 111, 144, on a ground consistent with this opinion by the dissenting judges); Brundred *v.* Rice, 49 Oh. St. 640; Chicora Co. *v.* Crews, 6 S. C. 243, 275; McGrew *v.* City Produce Exchange, 85 Tenn. 572; Le Warne *v.* Meyer, 38 Fed. Rep. 191. See also Salomon *v.* Broderip, [1897] A. C. 22, 43. *Cf.* Laflin Co. *v.* Sinsheimer, 46 Md. 315; Gow *v.* Collin Co., 109 Mich. 45; Cochran *v.* Arnold, 58 Pa. St. 399, 405.

contend that the existence of an alleged corporation can never be attacked collaterally. Assume the contention to be that the existence of an alleged corporation cannot be attacked collaterally, if the assumption of the right to be a corporation is made under peculiarly extenuating circumstances. Assume further that these extenuating circumstances are: (1) that an attempt to incorporate has been made resulting in a colorable corporate organization; (2) that there was a law authorizing the formation of such a corporation as was attempted; (3) that there has been user of some of the powers which such a corporation would possess; and (4) that the persons seeking to prevent collateral attack acted in good faith.[13] Under such circumstances, why should not the courts

[13] If the state grants to certain persons the privilege of acting as an artificial person, they are a corporation *de jure*. Whenever persons assume to act as an artificial person, without the authority of the state, it might properly be said that they are a corporation *de facto*. Sheer usurpation of the corporate privilege is a fact, no less than usurpation under extenuating circumstances. If this broad conception of a *de facto* corporation had been taken, then the subject of *de facto* corporations would have covered the whole subject of the usurpation of corporate power.

But it is clear that it has not been taken. Thus, persons who have been granted the privilege to act as an artificial person for some purposes may assume so to act for other purposes. When they leap the bounds of the privilege granted them, their act is a usurpation of corporate power. But the law of *ultra vires* transactions is not treated by the courts as a branch of the law of *de facto* corporations.

Similarly, even where the associates have not been granted the corporate privilege for any purpose, the courts have, in analogy to the law of *de facto* officers, and by a usage now altogether too well established to be profitably questioned, confined the conception of a *de facto* corporation within the bounds stated in the text. If associates usurp the corporate privilege when there is no law authorizing such a corporation as they assert themselves to be, collateral attack may or may not be allowed on the existence of the alleged corporation, but the law of *de facto* corporations does not control. Similarly, where the associates have not even a colorable organization, or where persons who have not acted in good faith seek to prevent the collateral attack. These cases form a branch of the law on the usurpation of corporate power, but not of the law on *de facto* corporations. This article deals only with *de facto* corporations in the narrow sense established by usage, — usurpation of corporate power under the peculiarly extenuating circumstances stated in the text.

To speak of these circumstances in detail.

1. *The attempt to incorporate must have gone so far as to result in a colorable corporate organization.* McLennan *v.* Hopkins, 2 Kan. App. 260; Johnson *v.* Corser, 34 Minn. 355 (see 52 Minn. 243); Abbott *v.* Omaha Co., 4 Neb. 416; McLeary *v.* Dawson, 87 Tex. 524, 538 ("a self-constituted body which was not even a *de facto* corporation"); Bergeron *v.* Hobbs, 96 Wis. 641. But *cf.* the language of the court in Methodist Church *v.* Pickett, 19 N. Y. 482, 485.

2. *There must have been a law authorizing the formation of such a corporation as was attempted.* Duke *v.* Taylor, 37 Fla. 64; American Co. *v.* Minnesota Co., 157 Ill. 641; Snyder *v.* Studebaker, 19 Ind. 462; Eaton *v.* Walker, 76 Mich. 579; Bradley *v.* Reppell, 133 Mo. 545; St. Louis Ass'n *v.* Hennessy, 11 Mo. App. 555; Evenson *v.* Elling-

refuse to allow any one but the state to call attention to any slip that was made in the attempt to form the corporation? At first blush the doctrine seems harmless and commendable, — to be

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son, 67 Wis. 634; Davis *v.* Stevens, 104 Fed. Rep. 235. *Cf.* Smith *v.* Sheeley, 12 Wall. (U. S.) 358.

If there is a law authorizing the formation of such a corporation, it is not fatal that the attempt to incorporate was under a different law. Georgia Co. *v.* Mercantile Co., 94 Ga. 306. *Cf.* Welch *v.* Old Dominion Co., 10 N. Y. Supp. 174.

A *de jure* corporation may be formed under a law passed by a *de facto* legislature. U. S. *v.* Insurance Companies, 22 Wall. (U. S.) 99.

3. *There must have been user of some of the powers which such a corporation would possess.* Without user there would be no assumption of corporate power. See Emery *v.* De Peyster, 77 N. Y. App. Div. 65, 67; Elgin Co. *v.* Loveland, 132 Fed. Rep. 41, 45.

4. *The persons seeking to prevent collateral attack must have acted in good faith.* In defining the limits of the *de facto* doctrine, the courts have sometimes made no express mention of good faith. Owensboro Co. *v.* Bliss, 132 Ala. 253; Baker *v.* Neff, 73 Ind. 68; Doty *v.* Patterson, 155 Ind. 60, 64; Finnegan *v.* Noerenberg, 52 Minn. 239; Gibbs' Estate, 157 Pa. St. 59, 69; Toledo Co. *v.* Continental Trust Co., 95 Fed. Rep. 497, 508. But in these cases no contention was made that the associates had not acted in good faith.

Express mention of good faith is usual. Duggan *v.* Colorado Co., 11 Colo. 113; American Co. *v.* Minnesota Co., 157 Ill. 641, 652; Stanwood *v.* Sterling Co., 107 Ill. App. 569; Williamson *v.* Kokomo Ass'n, 89 Ind. 389; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Haas *v.* Bank of Commerce, 41 Neb. 754; Vanneman *v.* Young, 52 N. J. L. 403; Elizabethtown Co. *v.* Green, 49 N. J. Eq. 329, 338; Hagerman *v.* Ohio Ass'n, 25 Oh. St. 186, 200; Society Perun *v.* Cleveland, 43 Oh. St. 481; Marsh *v.* Mathias, 19 Utah 350; Gilkey *v.* How, 105 Wis. 41, 45; Tulare District *v.* Shepard, 185 U. S. 1, 16.

If the attempt at incorporation is not made in good faith, but persons purchase the alleged stock in good faith, they should not be held personally liable to those who have contracted with the corporation. American Co. *v.* Heidenheimer, 80 Tex. 344 (see note 33). In Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 66, Story, J., said: "It would be extremely difficult to maintain, upon general principles of law, that a private fraud, between the original subscribers and commissioners, could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bona fide* holders, without any participation or notice of the fraud."

Ordinarily, the same result will be reached whether good faith is required in those who attempted incorporation or in those who now seek to prevent collateral attack upon incorporation. But it is submitted that American Co. *v.* Heidenheimer is a decision within the limits of the *de facto* doctrine, and that therefore the requirement as to good faith may properly be stated in the form used in the text.

The doctrine of *de facto* corporations usually arises where there has been an attempt to incorporate under a general law. But it is not confined to such cases. The legislature might by special act grant a charter which was to take effect upon the performance of certain conditions precedent. Such charter, it is submitted, would supply the place of the first and second requirements stated in the text. See Lucas *v.* Bank of Georgia, 2 Stew. (Ala.) 147; Gaines *v.* Bank of Mississippi, 12 Ark. 769; Middlesex Husbandmen *v.* Davis, 3 Met. (Mass.) 133; Utica Co. *v.* Tilman, 1 Wend. (N. Y.) 555; Turnpike Co. *v.* McCarson, 1 Dev. & B. (N. C.) 306; Searsburgh Co. *v.* Cutler, 6 Vt. 315, 322; Bank of Manchester *v.* Allen, 11 Vt. 302.

intended merely to save examination into all the details of the formation of corporations.[14]

In answer. In the first place, it is to be noted that, if the existence of a corporation is only collaterally in issue, it is well settled that proof of facts sufficient to satisfy the requirements of the *de facto* doctrine is sufficient to make a *primâ facie* case.[15] In

[14] It would be easy to accumulate dicta in support of such a doctrine. See, for example, Doty *v.* Patterson, 155 Ind. 60, 64 (but *cf.* the decisions in Busenback *v.* Attica Co., 43 Ind. 265; Indianapolis Co. *v.* Herkimer, 46 Ind. 142); Buffalo Co. *v.* Cary, 26 N. Y. 75, 77 (but *cf.* the decisions in Dorris *v.* Sweeney, 60 N. Y. 463, 467; N. Y. Cable Co. *v.* N. Y., 104 N. Y. 1, 43); Cochran *v.* Arnold, 58 Pa. St. 399, 405 (but *cf.* the decision in Guckert *v.* Hacke, 159 Pa. St. 303); Gilkey *v.* How, 105 Wis. 41, 46 (but *cf.* the decision in Slocum *v.* Head, 105 Wis. 431); New Orleans Co. *v.* Louisiana, 180 U. S. 320, 328 (but *cf.* the more restrained language by the same learned justice in Tulare District *v.* Shepard, 185 U. S. 1, 14, 17).

In New Jersey it has been laid down that equity will not, at the instance of a private individual, enjoin a *de facto* corporation from the exercise of powers which it would possess if a *de jure* corporation. Elizabethtown Co. *v.* Green, 49 N. J. Eq. 329, 331, 332. Equity is no doubt loath to determine questions as to the legal formation of corporations (*cf.* the determination of questions as to the title of real estate); and, moreover, should not entertain a bill by a private individual which is, in substance, a *quo warranto* proceeding (see second paragraph of note 12). But equity has jurisdiction to determine whether a corporation has been legally formed. The question was determined in the early case of Hill *v.* Beach, 12 N. J Eq. 31, and again in Union Water Co. *v.* Kean, 52 N. J. Eq. 111, 122, where Pitney, V. C., upholds the jurisdiction in an elaborate opinion. (*Cf.* the language of the court in National Docks Co. *v.* Central Railroad Co., 32 N. J. Eq. 755; West Jersey Co. *v.* Cape May Co., 34 N. J. Eq. 164; Terhune *v.* Midland Co., 38 N. J. Eq. 423; Attorney-General *v.* American Tobacco Co., 55 N. J. Eq. 352, 368; aff. 56 N. J. Eq. 847; Cumberland Co. *v.* Clinton Co., 64 N. J. Eq. 521, 523.) And a bill to restrain the assertion of a corporate right directly against complainant will not ordinarily be in substance a *quo warranto* proceeding. It might as well be argued that the plea of *nul tiel* corporation may never be permitted at law, because it is, *pro tanto*, a *quo warranto* proceeding.

Now, Hampton *v.* Clinton Co., 65 N. J. L. 158 (see note 28) shows that at law there is no sweeping rule against collateral attack. See also Trenton Co. *v.* United Co., 60 N. J. Eq. 500. Is the New Jersey law that, if a *de facto* corporation institutes proceedings to take A's land by eminent domain, he may successfully resist such proceedings, but that, even if immediate irreparable injury is being threatened, he may not resort to equity for an injunction? It is submitted that National Docks Co. *v.* Central Co., 32 N. J. Eq. 755, does not necessitate such a decision (see fourth paragraph of note 12).

See also Denver Co. *v.* Denver Co., 2 Colo. 673; Independent Order Foresters *v.* United Order, 94 Wis. 234, 241.

[15] Lucas *v.* Bank of Georgia, 2 Stew. (Ala.) 147; Gaines *v.* Bank of Mississippi, 12 Ark. 769; Memphis Co. *v.* Rives, 21 Ark. 302; Mix *v.* Bank of Bloomington, 91 Ill. 20; Eakright *v.* Logansport Co., 13 Ind. 404; Middlesex Husbandmen *v.* Davis, 3 Met. (Mass.) 133; Barrett *v.* Mead, 10 Allen (Mass.) 337; Merchants' Bank *v.* Glendon Co., 120 Mass. 97; Utica Co. *v.* Tilman, 1 Wend. (N. Y.) 555; Eaton *v.* Aspinwall, 19 N. Y. 119, 121; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 543; Turnpike Co. *v.* McCarson, 1 Dev. & B. (N. C.) 306; Searsburgh Co. *v.* Cutler, 6 Vt. 315, 322; Bank of Manchester *v.* Allen, 11 Vt. 302.

the second place, it is to be noted that most failures to conform strictly to statutory provisions are not fatal to the formation of the corporation. (*a*) If a provision of the statute has not been exactly followed, the court may hold that there has been substantial compliance.[16] (*b*) If some provision of the statute has not been followed at all, the court may hold such provision to be merely directory.[17] (*c*) If some mandatory provision has not been followed at all, the court may nevertheless hold that performance of the acts specified in such provision was not intended to be a condition precedent to the existence of the corporation, — that non-performance was intended at most to be a ground for declaring the corporate existence forfeited.[18] In all these cases the associates gain authority to act as a corporation.

See also Willard *v.* Trustees, 66 Ill. 55; Peoria Co. *v.* Peoria Co., 105 Ill. 110; Cozzens *v.* Chicago Co., 166 Ill. 213; Hager's Town Co. *v.* Creeger, 5 Har. & J. (Md.) 122; Bartlett *v.* Wilbur, 53 Md. 485, 498; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Packard *v.* Old Colony Co., 168 Mass. 92; Canal Co. *v.* Paas, 95 Mich. 372; Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539; Wood *v.* Jefferson Bank, 9 Cow. (N. Y.) 194; Bank of Toledo *v.* International Bank, 21 N. Y. 542; Williamsburgh Bank *v.* Solon, 136 N. Y. 465, 475; Augusta Co. *v.* Vertrees, 4 Lea (Tenn.) 75; Reynolds *v.* Myers, 51 Vt. 444.

[16] Van Pelt *v.* Home Ass'n, 79 Ga. 439; Eakright *v.* Logansport Co., 13 Ind. 404; Thornton *v.* Balcom, 85 Ia. 198; Seaton *v.* Grimm, 110 Ia. 145; Buffalo Co. *v.* Hatch, 20 N. Y. 157, 160; Ogdensburgh Co. *v.* Frost, 21 Barb. (N. Y.) 541; Thompson *v.* N. Y. Co., 3 Sandf. Ch. (N. Y.) 625, 652; Carpenter *v.* Frazier, 102 Tenn. 462; Rogers *v.* Danby Society, 19 Vt. 187, 191.

[17] Judah *v.* American Co., 4 Ind. 333; McClinch *v.* Sturgis, 72 Me. 288, 296; Newcomb *v.* Reed, 12 Allen (Mass.) 362; Braintree Co. *v.* Braintree, 146 Mass. 482, 488; Mead *v.* Keeler, 24 Barb. (N. Y.) 20, 25; Rassbeck *v.* Desterreicher, 55 How. Pr. (N. Y.) 516; Ossipee Co. *v.* Canney, 54 N. H. 295, 312; Grays *v.* Turnpike Co., 4 Rand. (Va.) 578, 581. See also Cross *v.* Pinckneyville Co., 17 Ill. 54; Busenback *v.* Attica Co., 43 Ind. 265, criticizing Eakright *v.* Logansport Co., 13 Ind. 404. On whether the state may take advantage of failure to follow a directory provision, see Rose Hill Co. *v.* People, 115 Ill. 133; Jackson *v.* Crown Co., 21 Utah 1. *Cf.* Bank of U. S. *v.* Dandridge, 12 Wheat. (U. S.) 64, 80.

[18] Sparks *v.* Woodstock Co., 87 Ala. 294; Brown *v.* Wyandotte Co., 68 Ark. 134, 140; Mitchell *v.* Rome Co., 17 Ga. 574; Boise City Co. *v.* Pinkham, 1 Idaho 790; Chiniquy *v.* Bishop of Chicago, 41 Ill. 148 (a corporation sole); Walton *v.* Riley, 85 Ky. 413 (overruling 81 Ky. 300); Portland Co. *v.* Bobb, 88 Ky. 226; South Bay Co. *v.* Gray, 30 Me. 547; Lord *v.* Essex Ass'n, 37 Md. 320, 326; Hammond *v.* Straus, 53 Md. 1, 14; Merrick *v.* Reynolds Co., 101 Mass. 381; Hawes *v.* Anglo-Saxon Co., 101 Mass. 385, 395; McGinty *v.* Athol Co., 155 Mass. 183, 185; Narragansett Bank *v.* Atlantic Co., 3 Met. (Mass.) 282, 288; Boston Co. *v.* Moring, 15 Gray (Mass.) 211; Shakopee Co., 37 Minn. 91; Granby Co. *v.* Richards, 95 Mo. 106; St. Joseph Co. *v.* Shambaugh, 106 Mo. 557, 567; Vanneman *v.* Young, 52 N. J. L. 403; Plank Road Co. *v.* Chamberlain, 32 N. Y. 651, 655; Society of Cutchogue, 131 N. Y. (also 41 Barb. (N. Y.) 568; 1 Sandf. (N. Y.) 158, 168); Hughesdale Co. *v.* Vanner, 12 R. I. 491; Cheraw Co. *v.* White, 14 S. C. 51; Harrod *v.* Hamer, 32 Wis. 162; Minor *v.* Mechanics'

We are dealing, therefore, only with a case where the court, on a sound construction of the statutes, finds the intent of the legislature to have been that performance of a certain act should be a condition precedent to incorporation.[19] The legislature might, indeed, have authorized the formation of two kinds of corporations, one good against the world, and one good against all but the state. But such statutes are rare.[20] The legislature has authorized the formation only of a corporation good against the world. It has declared that a certain act shall be performed before any such corporation shall come into existence. The act has not been performed. Is it proper, notwithstanding, for the court to allow the assertion of rights dependent upon incorporation?

It is not for the court to create a corporation. The franchise to

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Bank, 1 Pet. (U. S.) 46, 65; Wells Co. *v.* Gastonia Co., 198 U. S. 177; Young Co. *v.* Young Co., 72 Fed. Rep. 62; Ryland *v.* Hollinger, 117 Fed. Rep. 216. See also Southern Bank *v.* Williams, 25 Ga. 534; Hastings *v.* Amherst Co., 9 Cush. (Mass.) 596, 600; Quincy Canal *v.* Newcomb, 7 Met. (Mass.) 276, 282; Raegener *v.* Hubbard, 167 N. Y. 301, 306; Waterford Co. *v.* Dalbiac, 6 Exch. 443.

[19] For instances of such construction see Allman *v.* Havana Co., 88 Ill. 521, 526; Loverin *v.* McLaughlin, 161 Ill. 417, 425; McIntire *v.* McLain Ass'n, 40 Ind. 104; Kaiser *v.* Lawrence Bank, 56 Ia. 104; Field *v.* Cooks, 16 La Ann. 153; Utley *v.* Union Co., 11 Gray (Mass.) 139, 141; Jersey City Co. *v.* Dwight, 29 N. J. Eq. 242, 247; Crocker *v.* Crane, 21 Wend. (N. Y.) 211; People *v.* Nelson, 46 N. Y. 477, 480; N. Y. Co. *v.* N. Y., 104 N. Y. 1, 43; Card *v.* Moore, 68 N. Y. App. Div. 327, 331; aff. 173 N. Y. 598; Guckert *v.* Hacke, 159 Pa. St. 303; Bergeron *v.* Hobbs, 96 Wis. 641; Elgin Co. *v.* Loveland, 132 Fed. Rep. 41, 45.

[20] In California, § 6 of Laws of 1850, c. 128, as amended by Laws of 1862, c. 124, provided: "The question of the due incorporation of any company, claiming in good faith to be a corporation under the laws of this state and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such *de facto* corporation may be a party." This was substantially reënacted as § 358 of the Civil Code. For decisions since the enactment of this statute, see 22 Cal. 434; 26 *ibid.* 286; 37 *ibid.* 354; 37 *ibid.* 538; 51 *ibid.* 406; 55 *ibid.* 98; 67 *ibid.* 526; 70 *ibid.* 163; 72 *ibid.* 379; 80 *ibid.* 181; 82 *ibid.* 184; 90 *ibid.* 22; 97 *ibid.* 276; 100 *ibid.* 87; 102 *ibid.* 55; 103 *ibid.* 506; 104 *ibid.* 334; 126 *ibid.* 541; 128 *ibid.* 136; 130 *ibid.* 27; 137 *ibid.* 441; 141 *ibid.* 713; 4 Sawy. (U. S.) 133; 46 Fed. Rep. 709. See also § 2892, Comp. L. Dakota, cited in Davis *v.* Stevens, 104 Fed. Rep. 235, and Code of Georgia (1895), § 1862, and 108 Ga. 345; 109 *ibid.* 666; 121 *ibid.* 513.

The Code of Iowa (1897), § 1636, which substantially reënacts the provision first adopted in § 704 of the Code of 1851, provides: "No person or persons acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such an acting corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense." There is a similar statute in Kentucky. Comp. Stat. 1903, § 566. Except so far as these statutes dispense with the requirements for a *de facto* corporation (see third paragraph of note 13), it is submitted that they are only declaratory (see notes 24, 25, and 33).

be a corporation can be granted only by the legislature. Is the court not to respect this division of powers, but to make itself, *de facto*, a legislature?

It may well be answered that it is not for the courts to create public officers any more than to create corporations; and yet the doctrine of *de facto* public officers is well established, and a doctrine of *de facto* corporations for the benefit of third persons has also found its place in the law.[21]

The question therefore reduces itself at last to a question of judgment. Are there considerations of public policy so urgent as to make it proper for the courts to allow persons to assert the right to be a corporation even when, on a sound construction of the legislative enactments, they have no such right? Considerations tending to an affirmative answer are that the courts should save time by refusing to go into the details of incorporation; and that they should encourage the use of the corporate device by establishing a consolation doctrine to the effect that, if persons try to form a corporation and pretty nearly succeed, they shall have pretty nearly as many rights as though they had succeeded. Considerations tending to a negative answer are that the courts should not, directly or indirectly, take to themselves powers belonging to the legislature, and that it is anomalous to bridge a legal gap even in favor of a person who has made an expenditure in good faith.

If there is a doctrine of *de facto* corporations, remedial to the associates themselves, the courts ought to enter upon it not lightly, but discreetly, advisedly.

This is not to say that there may never be circumstances in which it is proper to apply such a doctrine. Suppose that A, owner of land, purports for a consideration to grant it to a *de facto* corporation, and ejectment is brought, in the name of the corporation, against X, a stranger to the title. The associates, even if unincorporated, would, it is submitted, at least be entitled in equity to require a conveyance from A, and at law to maintain ejectment in the name of A.[22] And it is the better opinion that full effect

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[21] See note 2.

[22] There is authority that if a deed of real estate purports to run to a corporation, and there is no such corporation authorized by the state, the deed is void, and the grantor may successfully assert title to the land against the associates. Harriman *v.* Southam, 16 Ind. 190 (overruled in Snyder *v.* Studebaker, 19 Ind. 462); Douthitt *v.* Stinson, 63 Mo. 268 (distinguished in Reinhard *v.* Virginia Co., 107 Mo. 616, and White Oak Society *v.* Murray, 145 Mo. 622); White *v.* Campbell, 5 Humph. (Tenn.) 38; Russell *v.* Topping, 5 McLean (U. S.) 194, 202 (but this cannot stand after Smith *v.*

may be given to the conveyance at law, — that the title may be held to vest in the associates as natural persons (and this would obviate inquiry into the question of actual consideration).[23] The

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Sheeley, 12 Wall. (U. S.) 358). See also Provost *v.* Morgan's Co., 42 La. Ann. 809; German Ass'n *v.* Scholler, 10 Minn. 331; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179, 182; Childs *v.* Hurd, 32 W. Va. 66, 100.

But, by the more recent decisions, it is held that (at least if the requirements of the *de facto* doctrine are satisfied) the grantor and those in privity with him are estopped to assert title against the associates (see note 33). Cahall *v.* Citizens' Ass'n, 61 Ala. 232; Bates *v.* Wilson, 14 Colo. 140; Thompson *v.* Candor, 60 Ill. 244; The Joliet *v.* Frances, 85 Ill. App. 243; Baker *v.* Neff, 73 Ind. 68; Williamson *v.* Kokomo Ass'n, 89 Ind. 389 (junior mortgagee cannot defeat prior mortgage to *de facto* corporation); Sword *v.* Wickersham, 29 Kan. 746; Reinhard *v.* Virginia Co., 107 Mo. 616 (and cases cited); Frost *v.* Frostburg Co., 24 How. (U. S.) 278. See also Keene *v.* Van Reuth, 48 Md. 184; Packard *v.* Old Colony Co., 168 Mass. 92, 96; Smith *v.* Sheeley, 12 Wall. (U. S.) 358. But *cf.* Jones *v.* Aspen Hardware Co., 21 Colo. 263.

In Otoe Ass'n *v.* Doman, 95 N. W. Rep. 327 (Neb.), a *de facto* corporation maintained a proceeding against its grantor for reformation of the deed.

On a grant by a municipal corporation of a franchise to a *de facto* corporation, see Kalamazoo *v.* Kalamazoo Co., 124 Mich. 74.

In Whipple *v.* Parker, 29 Mich. 369, Christiancy, J., said (p. 381): "Courts of equity at least, if not also courts of law, would find no difficulty in recognizing their property rights as individuals, or in securing to them as a partnership, or as joint owners, or as individuals, in some form the full enjoyment of their rights." Note also Burton *v.* Schildbach, 45 Mich. 504.

On the right to maintain ejectment in the name of the grantor, note that the grantee of a disseisee might maintain ejectment in the name of his grantor. See McMahan *v.* Bowe, 114 Mass. 140, 145.

[23] In Maugham *v.* Sharpe, 17 C. B. (N. S.) 443, chattels were mortgaged to "The City Investment and Advance Company." The mortgagor believed he was conveying to a corporation (*per* Erle, C. J., at p. 462); but there was no such corporation authorized by the state. The court held that the title passed to the individuals doing business under that name. Williams, J., said (p. 463): "I apprehend, the meaning of the grant is plain: the deed purports and intends to convey the goods to those persons who use the style and firm of The City Investment and Advance Company. They may or may not be a corporation; but when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." Jones *v.* Aspen Co., 21 Colo. 263, 271; New Haven Wire Co. Cases, 57 Conn. 352, 394; *accord.* See also Farnsworth *v.* Drake, 11 Ind. 101; Fay *v.* Noble, 7 Cush. (Mass.) 188, 194; American Silk Works *v.* Salomon, 6 T. & C. (N. Y.) 352. On a charitable bequest to a *de facto* corporation, note Quinn *v.* Shields, 62 Ia. 129 (in connection with Miller *v.* Chittenden, 2 Ia. 315, and Grant *v.* Saunders, 121 Ia. 80); Lutheran Church *v.* Mook, 4 Redf. Sur. (N. Y.) 513.

The English courts would follow Maugham *v.* Sharpe, if the subject of the conveyance was realty. Wray *v.* Wray, [1905] 2 Ch. 349. In Byam *v.* Bickford, 140 Mass. 31, Devens, J., said (p. 32): "But the South Chelmsford Hall Association was a body well known, all the members of which could be ascertained; and, as it could not take as a corporation, the deed may properly be construed as a grant of the estate to those who were properly described by this title. . . . The persons associated in the society were thus tenants in common of the land conveyed." See also Hart *v.* Seymour, 147

associates are therefore asserting a property right which they are entitled to assert in some form. Looking at the substance, and not the form, the case will rarely, if ever, arise where X is prejudiced if the associates are allowed to assert the right as an artificial person.[24] Similarly, if X makes a note payable to A, and A negotiates it to a *de facto* corporation, and suit is brought in the name of the corporation against A.[25]

But it would seem to be clear that there should be no sweeping doctrine to the effect that a *de facto* corporation may (unless checked by the state) exercise the same powers and privileges as

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Ill. 598, 610; Clifton Heights Co. *v.* Randell, 82 Ia. 89; Friedman *v.* Goodwin, 9 Fed. Cas. 818.

And conversely a conveyance of realty to the "Asheville Division No. 15" will pass title to such corporation, although the grantor supposed he was conveying to a voluntary association. Asheville Division *v.* Aston, 92 N. C. 578.

On a deed to A and "associates," see Ennis *v.* Brown, 1 N. Y. App. Div. 22.

On whether a title in natural persons will, upon their incorporation, pass to the corporation without formal transfer, see McCandless *v.* Inland Acid Co., 112 Ga. 291; Land Co. *v.* Randell, 82 Ia. 89; Catholic Church *v.* Tobbein, 82 Mo. 418; American Silk Works *v.* Salomon, 6 T. & C. (N. Y.) 352.

[24] A *de facto* corporation may maintain ejectment against a person who has not dealt with the associates as a corporation. East Norway Church *v.* Froislie, 37 Minn. 447, 451 ("It would be unjust and intolerable if . . . every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization"); Chiniquy *v.* Bishop of Chicago, 41 Ill. 148. But *cf.* Proprietors of Southold *v.* Horton, 6 Hill (N. Y.) 501; Augusta Co. *v.* Vertrees, 4 Lea (Tenn.) 75.

It may maintain an action for a tort to real or personal property. Buffalo Co. *v.* Cary, 26 N. Y. 75, 77–78; Remington Co. *v.* O'Dougherty, 65 N. Y. 570 (conversion); Persse Works *v.* Willett, 1 Rob. (N. Y.) 131 (trespass upon personalty); American Silk Works *v.* Salomon, 6 T. & C. (N. Y.) 352 (conversion); Elizabeth Academy *v.* Lindsey, 6 Ired. (N. C.) 476 (conversion); Searsburgh Co. *v.* Cutler, 6 Vt. 315, 323 ("For the purpose . . . of protecting the property . . . from tortfeasors, it is enough to shew a corporation *de facto*"); Baltimore Co. *v.* Baptist Church, 137 U. S. 568, 572 (nuisance. *Per* Gray, J., a *de facto* corporation may "maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong"); American Co. *v.* New York, 68 Fed. Rep. 227 (infringement of patent).

It may maintain a bill for an injunction to restrain irreparable injury to property. Cincinnati Co. *v.* Danville Co., 75 Ill. 113; Williams *v.* Citizens' Co., 130 Ind. 71. See also Denver *v.* Mullen, 7 Colo. 345.

But *cf.* Slocum *v.* Providence Co., 10 R. I. 112, 114.

[25] Cozzens *v.* Chicago Co., 166 Ill. 213; Wilcox *v.* Toledo Co., 43 Mich. 584, 590; Haas *v.* Bank of Commerce, 41 Neb. 754. See also Mix *v.* Bank of Bloomington, 91 Ill. 20; Chicago Co. *v.* Stafford County, 36 Kan. 121, 128. *Cf.* Marion Bank *v.* Dunkin, 54 Ala. 471; Hungerford Bank *v.* Van Nostrand, 106 Mass. 559.

An association *de facto* may recover for use and occupation of land. Philippine Sugar Co. *v.* U. S., 39 Ct. Cl. 225.

A grants land to a *de facto* corporation. It may maintain proceedings to have the land discharged from the incumbrance of a judgment against A. Keyes *v.* Smith, 67 N. J. L. 190.

a *de jure* corporation. The doctrine should never be applied, in favor of the associates themselves, to the prejudice of a person who has not dealt with them as a corporation.

Suppose A agrees to take and pay for stock in the X corporation when formed. Only a *de facto* corporation is formed. If a *de jure* corporation had been formed, it could have compelled A to pay for the stock.[26] But the *de facto* corporation has no such right.[27]

Suppose the legislature has authorized the formation of railroad corporations and has authorized such corporations to condemn land. Only a *de facto* railroad corporation is formed. It cannot take land against the will of the owner.[28]

To return to the case put in the opening paragraph. If persons

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[26] Athol Co. *v.* Carey, 116 Mass. 471.

[27] Schloss *v.* Montgomery Co., 87 Ala. 411; Indianapolis Co. *v.* Herkimer, 46 Ind. 142; Nelson *v.* Blakey, 47 Ind. 38; Reed *v.* Richmond Co., 50 Ind. 342, 83 Ind. 9; Rikhoff *v.* Brown's Co., 68 Ind. 388; Coppage *v.* Hutton, 124 Ind. 401; Allman *v.* Havana Co., 88 Ill. 521; Richmond Ass'n *v.* Clarke, 61 Me. 351; Taggart *v.* Western Co., 24 Md. 563; Katama Land Co. *v.* Holley, 129 Mass. 540; Columbia Co. *v.* Dixon, 46 Minn. 463, 465; Capps *v.* Hastings Co., 40 Neb. 470; Dorris *v.* Sweeney, 60 N. Y. 463; Greenbrier Exposition *v.* Rodes, 37 W. Va. 738. See also McIntire *v.* McLain Ass'n, 40 Ind. 104; Stowe *v.* Flagg, 72 Ill. 397; Mansfield Co. *v.* Drinker, 30 Mich. 124; Crocker *v.* Crane, 21 Wend. (N. Y.) 211; Wilmington Co. *v.* Wright, 5 Jones (N. C.) 304. But *cf.* Willard *v.* Church of Rockville Centre, 66 Ill. 55.

But otherwise if the subscriber took part in the attempt to incorporate, or thereafter assented to treat with the corporation as though it had been lawfully formed (see note 33). Selma *v.* Tipton, 5 Ala. 787, 807; Danbury Co. *v.* Wilson, 22 Conn. 435; Hause *v.* Mannheimer, 67 Minn. 194; Cayuga Co. *v.* Kyle, 64 N. Y. 185; United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1; Tar River Co. *v.* Neal, 3 Hawks (N. C.) 520; Rockville Turnpike Road *v.* Van Ness, 2 Cranch C. C. (U. S.) 449.

See also Childs *v.* Smith, 46 N. Y. 34.

[28] Piper *v.* Rhodes, 30 Ind. 309 (assessment by *de facto* turnpike company); McIntire *v.* McLain Ass'n, 40 Ind. 104 (assessment by *de facto* drainage company); Newton Co. *v.* Nofsinger, 43 Ind. 566 (same); Knight *v.* Flatrock Co., 45 Ind. 134 (assessment of tax in aid of *de facto* turnpike company); Williamson *v.* Kokomo Ass'n, 89 Ind. 389, 392 (condemnation. In Boyd *v.* Traction Co., 161 Ind. 587, 589, the court did not find it necessary to decide the point); Hopkins *v.* Kansas City Co., 79 Mo. 98 (condemnation); St. Joseph Co. *v.* Shambaugh, 106 Mo. 557, 566 (condemnation); Hampton *v.* Clinton Co., 65 N. J. L. 158, 160 ("There is no doubt that non-compliance with conditions precedent to incorporation will defeat a condemnation"); N. Y. Cable Co. *v.* N. Y., 104 N. Y. 1, 43 (condemnation); Matter of Union Co., 112 N. Y. 61 (same); Matter of New York Co., 35 Hun (N. Y.) 220 (same. On appeal, 99 N. Y. 12); Matter of Broadway Co., 73 Hun (N. Y.) 7, 13 (same); Kinston Co. *v.* Stroud, 132 N. C. 413 (same. *Cf.* Wellington Co. *v.* Cashie Co., 114 N. C. 690. As to latter case, see note 12); Atlantic Co. *v.* Sullivant, 5 Oh. St. 276 (same); Atkinson *v.* Marietta Co., 15 Oh. St. 21 (same); Powers *v.* Hazelton Co., 33 Oh. St. 429 (same); Tulare District *v.* Shepard, 185 U. S. 1, 17 (same). See also Niemeyer *v.* Little Rock Ry., 43 Ark. 111; Fales *v.* Whiting, 7 Pick. (Mass.) 225; Trenton Co. *v.* United Co., 60

employ agents, they are responsible for the torts of those agents while they are acting within the scope of their employment. Persons injured by such torts have a well-established common law right to call upon the principal to respond. Now the legislature has authorized those persons who do specified acts to exercise the privilege of acting as an artificial person, — of holding property and appointing agents as such artificial person. If the specified acts are done, the artificial person becomes the principal, and redress may be had only out of the property of this principal. But persons who have not done the specified acts should not be given this immunity, which is dependent upon incorporation.

The subscriber to stock of a corporation to be formed has a right, under that portion of the common law which deals with contracts, to have stock of a corporation authorized by the state. The courts ought not to ignore or impair that right. The person injured by the tort of the servant has a right, under that portion of the common law which deals with torts and agents, to have the master respond. The courts ought not to ignore or impair that right.

It may be urged that the exercise of the power of eminent domain is much more important than the exercise of the power to appoint an agent as an artificial person. The exercise of such a power is indeed a high act of sovereignty, and this consideration must incline courts to construe grants of the power with great strictness.[29] The grant of a power to appoint an agent as an artificial person might not be construed with the same strictness. But neither power can be exercised except upon the terms laid down

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N. J. Eq. 500; Farnham *v.* Benedict, 107 N. Y. 159; New Orleans Co. *v.* Louisiana Co., 11 Fed. Rep. 277.

There is considerable authority opposed to the text. Central of Georgia Co. *v.* Union Springs Co., 144 Ala. 639; McAuley *v.* Columbus Co., 83 Ill. 348; Peoria Co. *v.* Peoria Co., 105 Ill. 110; Chicago Co. *v.* Chicago Co., 112 Ill. 589; Morrison *v.* Forman, 177 Ill. 427; Eddeeman *v.* Union Co., 217 Ill. 409, 414; Detroit Co. *v.* Campbell, 140 Mich. 384, 394 (relying on 44 Mich. 387, and 81 Mich. 378, which only decided that the question could not be litigated in *certiorari* proceedings); Postal Co. *v.* Oregon Co., 23 Utah 474, 482. See also Osborn *v.* People, 103 Ill. 224; Ward *v.* Minnesota Co., 119 Ill. 287; Reisner *v.* Strong, 24 Kan. 410, 417; Portland Co. *v.* Bobb, 88 Ky. 226; Farnham *v.* Delaware Co., 61 Pa. St. 265. But note the explanation of the Illinois doctrine made in Henry *v.* Centralia Co., 121 Ill. 264, 267.

On the litigation of this question in *certiorari* proceedings, see Schroeder *v.* Detroit Co., 44 Mich. 387; Traverse Co. *v.* Seymour, 81 Mich. 378; State *v.* Egg Harbor City, 55 N. J. L. 245.

[29] Matter of Poughkeepsie Bridge Co., 108 N. Y. 483.

by the legislature. When the terms are ascertained by a proper construction of the legislative grants, it is no more proper for the courts to vary those terms in one case than in the other.

Compare the consequences of the exercise of these two powers to the person against whom they are asserted. In the one case his land is taken from him against his will, but the fair value is paid him. In the second case his body is injured, without his fault, and he is referred to an empty treasury for compensation.[30]

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[30] Authorities bearing on the case put in the opening paragraph of the text are as follows. In Vredenburg *v.* Behan, 33 La. Ann. 627, the plaintiff sued on account of damage done by an animal kept by the "Crescent City Rifle Club." The defendants contended that this club was a corporation, and that the corporation alone was liable for the tort. The court held that the statutes of Louisiana did not authorize the formation of such a corporation, and that the defendants — members of the club — were personally liable. "It is a principle of law that cannot be successfully controverted, that where persons sought to be made liable for their acts, imprudence, or negligence, seek to escape such liability by pleading some privilege or immunity in derogation of common right, they must clearly establish the existence of the same, and bring themselves strictly within the provisions of the law on which they rest such claim" (p. 635). (It may be suggested that Article 446 of the Civil Code prevents all recognition of the *de facto* doctrine, and that therefore the reasoning of this case has no bearing upon the proper scope of such a doctrine; but it has not been so construed. For applications of the *de facto* doctrine see Blanc *v.* Germania Bank, 114 La. 739, and cases cited.)

In Smith *v.* Warden, 86 Mo. 382, the plaintiff sued on account of a tort committed by an agent of the defendants. The defendants contended that the tortfeasor was agent of a limited partnership, and that this partnership alone was liable, as master, for the tort. But the court held that one of the acts which was a prerequisite to the formation of such a limited partnership had not been performed, and that the defendants — who were assuming to do business as such limited partnership — were personally liable.

Lamming *v.* Galusha, 81 Hun (N. Y.) 247 (aff. 151 N. Y. 648), is against the text. But it may be noted: (1) the plaintiff's predecessor in title had given a written consent for the construction of the railroad, which consent was intended to operate "as something more than a mere license." The railroad had been constructed at the time the plaintiff bought, and the associates were openly asserting their right to act as a corporation. The plaintiff did nothing for eight years. He then asked for an injunction and damages. (2) The opinion is of a single justice sitting at special term. He seems to have been of the opinion (p. 252) that, if there was not substantial compliance with all the provisions of the statute, there would not be a corporation *de jure* (see notes 17 and 18). He relies on California cases decided after the statute respecting *de facto* corporations had been passed (see note 20), and his attention seems not to have been called to the statute.

In Guckert *v.* Hacke, 159 Pa. St. 303, A contracted with the associates. The associates intended to contract as a corporation, and the requirements of the *de facto* doctrine were satisfied. But a condition precedent to the formation of a corporation had not been performed, and A did not know that the associates were assuming to contract as a corporation. Held, that A, since he was not estopped (see note 33),

We have thus far assumed that A, against whom the *de facto* doctrine is asserted, has not, by dealings with the associates, recognized their right to act as a corporation. But if the associates assume to act as a corporation, and A is content to deal with them as a corporation, entirely new considerations present themselves. True it is that the associates had not the corporate privilege, but does it lie in A's mouth to plead this?

If A, suing for a breach of a contract made under such circumstances, chose to name the alleged corporation as party defendant, the associates could not in fairness ask to show that, though they had represented themselves to be a corporation and had contracted with A on that basis, yet, nevertheless, owing to their failure to comply with the statutory requirements, they had had no authority to act as a corporation.

The converse is not so clear. A never represented that the associates were a corporation; he simply acted on their own representation. Nevertheless, he has consented to enter into a contract with the associates on a corporate basis. The associates expected to be shielded, by their possession of the corporate privilege,

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could hold the associates personally liable for a breach of the contract. Christian Co. *v.* Lumber Co., 121 Ala. 340; Field *v.* Cooks, 16 La. Ann. 153; N. Y. Bank *v.* Crowell, 177 Pa. St. 313; Slocum *v.* Head, 105 Wis. 431; Clausen *v.* Head, 110 Wis. 405; *accord.* See also Williams *v.* Hewitt, 47 La. Ann. 1076, 1082; Johnson *v* Okerstrom, 70 Minn. 303, 311; Queen City Co. *v.* Crawford, 127 Mo. 356, 363; Vanhorn *v.* Corcoran, 127 Pa. St. 255, 268 (*cf.* Allegheny Bank *v.* Bailey, 147 Pa. St. 111); Mitchell *v.* Jensen, 29 Utah 346, 360.

Hampton *v.* Clinton Co., 65 N. J. L. 158, 160. "The cases to which we have been referred, as holding that persons dealing with *de facto* corporations are estopped from denying their legal existence and that such corporations may, by actions at law, protect their rights and property against invasion, are not applicable to the present controversy. Here there is an attempt to take the property of a citizen against his will."

Searsburgh Co. *v.* Cutler, 6 Vt. 315, 323. "Where an authority is claimed, by virtue of corporate powers, to interfere with the person or property of the citizen, greater strictness is required."

Slocum *v.* Head, 105 Wis. 431, 434 (paraphrased). An examination of all the authorities, however, limits the immunity from personal liability, which may be claimed by those who have in good faith attempted to organize and do business as corporations, to transactions with persons who have dealt with them as a corporation.

Note also the restrained language of Mr. Justice Gray in Baltimore Co. *v.* Baptist Church, 137 U. S. 568, 571, 572. A *de facto* corporation may "maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong." To the same effect are Tar River Co. *v.* Neal, 3 Hawks (N. C.) 520, 537; Savings Bank Co. *v.* Miller, 24 Oh. Circ. Ct. Rep. 198, 206. And see the Iowa and Kentucky statutes (note 20).

against unlimited liability for a breach of the contract, and A may fairly be charged with knowledge of this. In consenting to contract with them as a corporation, he has, by necessary inference, consented to avail himself on a breach of the contract of only such remedies as could be used if the associates possessed the corporate privilege. "Upon broad grounds of right, justice, and equity,"[31] A ought not, with his eyes open, to enter into a contract which assumes the existence of a corporation, and then ask for remedies which involve a denial of such existence. In a word, not only against the associates, but against A, there is the proper basis for the argument *ad hominem*.

While, however, it is fair between the parties that a contract made on a corporate basis should be enforced on the same basis, is it not against public policy thus to allow parties to create *pro tanto* corporations at their will? A court might consider this objection fatal; and, even when A sues the corporation, and shows that the requirements of the *de facto* doctrine are satisfied, it might permit the associates to take advantage of their own failure to observe the statutes.[32] But it is rare for a court to take this extreme position.

It is in this connection that the courts make the most important application of the *de facto* conception. If associates have assumed to contract as a corporation, and the requirements of the *de facto* doctrine are satisfied, then, ordinarily, there will be no sufficient objection, on the ground of public policy, to permitting both parties to the contract to have such remedies, and such remedies only, as would be permitted if a *de jure* corporation had been formed.[33]

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[31] *Per* Cooley, J., in Swartwout *v.* Michigan Co., 24 Mich. 389, 396.

[32] So held in Boyce *v.* Towsontown Church, 46 Md. 359.

[33] The associates, if sued as a corporation, cannot defend on the ground that they were not authorized to act as a corporation when the contract was made. Georgia Ice Co. *v.* Porter, 70 Ga. 637; Racine Co. *v.* Farmers' Trust Co., 49 Ill. 331, 346 (*cf.* Gent *v.* Manufacturers Co., 107 Ill. 652); Humphrey *v.* Patrons' Ass'n, 50 Ia. 607 (*cf.* Kirkpatrick *v.* Church of Keota, 63 Ia. 372); Dooley *v.* Cheshire Glass Co., 15 Gray (Mass.) 494; Kelley *v.* Newburyport Co., 141 Mass. 496; Empire Co. *v.* Stuart, 46 Mich. 482; Scheufler *v.* Grand Lodge, 45 Minn. 256; Callender *v.* Painesville Co., 11 Oh. St. 516; Hamilton *v.* Clarion Co., 144 Pa. St. 34; Liter *v.* Ozokerite Co., 7 Utah 487; Toledo Co. *v.* Continental Trust Co., 95 Fed. Rep. 497, 507. See also McCullough *v.* Talladega Co., 46 Ala. 376; Wood *v.* Wiley Construction Co., 56 Conn. 87; Commonwealth *v.* Licking Valley Ass'n, 118 Ky. 791; Perine *v.* Grand Lodge, 48 Minn. 82; Rush *v.* Halcyon Co., 84 N. C. 702; Miss. Code, § 841. *Contra*, Boyce *v.* Towsontown Church, 46 Md. 359 (but *cf.* Franz *v.* Teutonia Ass'n, 24 Md. 259; Keene *v.* Van Reuth, 48 Md. 184; Bartlett *v.* Wilbur, 53 Md. 485, 498).

The state may properly make a *de facto* corporation sole defendant (not joining the

Whether, when the requirements of the *de facto* doctrine have

associates) in a *quo warranto* proceeding. New Orleans Co. *v.* Louisiana, 180 U. S. 320.

Similarly, a creditor may hold the defendant, as a stockholder, director, or officer, to such liability as would have attached to him if the associates had been authorized to act as a corporation when the contract was made. Lehman *v.* Warner, 61 Ala. 455; Central Ass'n *v.* Alabama Co., 70 Ala. 120; Harris *v.* Gateway Co., 128 Ala. 652; Corwith *v.* Culver, 69 Ill. 502; Wheelock *v.* Kost, 77 Ill. 296; Tanner *v.* Nichols, 80 S. W. Rep. 225 (Ky.); Priest *v.* Essex Hat Co., 115 Mass. 380; Eaton *v.* Aspinwall, 19 N. Y. 119 (see also 26 Barb. (N. Y.) 202); Perkins *v.* Hatch, 4 Hun (N. Y.) 137; Rowland *v.* Meader Co., 38 Oh. St. 269, 272 (citing 33 Oh. St. 107); Hamilton *v.* Clarion Co., 144 Pa. St. 34; Slocum *v.* Providence Co., 10 R. I. 112; Slocum *v.* Warren, 10 R. I. 116. See also Peel's Case, L. R. 2 Ch. 674. *Cf.* Utley *v.* Union Tool Co., 11 Gray (Mass.) 139; DeWitt *v.* Hastings, 69 N. Y. 518; Gardner *v.* Post, 43 Pa. St. 19.

One of the associates cannot take advantage, against his fellow associates, of the lack of authority to act as a corporation. Merchants Line *v.* Waganer, 71 Ala. 581, 585; Bushnell *v.* Consolidated Ice Co., 138 Ill. 67; Curtis *v.* Tracy, 169 Ill. 233; Lincoln Park *v.* Swatek, 204 Ill. 228; Heald *v.* Owen, 79 Ia. 23; Venable *v.* Atchison Church, 25 Kan. 177; Foster *v.* Moulton, 35 Minn. 458; Raisbeck *v.* Oesterricher, 4 Abb. N. C. (N. Y.) 444; Marsh *v.* Mathias, 19 Utah 350; Franke *v.* Mann, 106 Wis. 118. See also Baker *v.* Backus, 32 Ill. 79. *Cf.* Flagg *v.* Stowe, 85 Ill. 164; Doyle *v.* Mizner, 42 Mich. 332. If one of the associates is, owing to the lack of authority, subjected to personal liability, he may have contribution. Richardson *v.* Pitts, 71 Mo. 128; Aspinwall *v.* Sacchi, 57 N. Y. 331. *Cf.* Heald *v.* Owen, 79 Ia. 23.

Conversely, the body of associates cannot take advantage of such lack against one of their number. Meurer *v.* Detroit Ass'n, 95 Mich. 451.

If A promises B a commission for selling property to C, or any corporation organized by him, and a *de facto* corporation, organized by C, purchases the property, B is entitled to his commission. Smith *v.* Mayfield, 163 Ill. 447.

If A contracts with the associates as a corporation, and A is sued upon the contract in the name of the corporation, he cannot take advantage of their lack of authority to act as a corporation. Bibb *v.* Hall, 101 Ala. 79; Canfield *v.* Gregory, 66 Conn. 9; Wood *v.* Coosa Co., 32 Ga. 273; Petty *v.* Brunswick Co., 109 Ga. 666; Marsh *v.* Astoria Lodge, 27 Ill. 421; Ramsey *v.* Peoria Co., 55 Ill. 311; Hudson *v.* Green Hill Corporation, 113 Ill. 618; Brownlee *v.* Ohio Co., 18 Ind. 68; Bartholomew County *v.* Bright, 18 Ind. 93; Mullen *v.* Beech Grove Park, 64 Ind. 202; Beatty *v.* Bartholomew Society, 76 Ind. 91; Jones *v.* Kokomo Ass'n, 77 Ind. 340; Smelser *v.* Wayne Co., 82 Ind. 417; Cravens *v.* Eagle Co., 120 Ind. 6; Washington College *v.* Duke, 14 Ia. 14; Hunt *v.* Kansas Co., 11 Kan. 412; Gill *v.* Kentucky Co., 7 Bush (Ky.) 635; Seven Star Grange *v.* Ferguson, 98 Me. 176; Worcester Medical Institution *v.* Harding, 11 Cush. (Mass.) 285; Butchers' Bank *v.* McDonald, 130 Mass. 264; Cahill *v.* Kalamazoo Co., 2 Doug. (Mich.) 124; Swartwout *v.* Michigan Co., 24 Mich. 389; Estey Co. *v.* Runnels, 55 Mich. 130; Stofflet *v.* Strome, 101 Mich. 197; French *v.* Donohue, 29 Minn. 111; Minnesota Co. *v.* Denslow, 46 Minn. 171; Lincoln Ass'n *v.* Graham, 7 Neb. 173; Livingston Ass'n *v.* Drummond, 49 Neb. 200; Equitable Ass'n *v.* Bidwell, 60 Neb. 169; Ossipee Co. *v.* Canney, 54 N. H. 295 (explaining Unity Co. *v.* Cram, 43 N. H. 636); Way *v.* American Grease Co., 60 N. J. Eq. 263, 266; Methodist Church *v.* Pickett, 19 N. Y. 482; Leonardsville Bank *v.* Willard, 25 N. Y. 574; Buffalo Co. *v.* Cary, 26 N. Y. 75; Phœnix Co. *v.* Badger, 67 N. Y. 294, 298; Com-

not been satisfied, considerations of public policy will prevent

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mercial Bank *v.* Pfeiffer, 108 N. Y. 242, 254 (to same effect, 15 Abb. Pr. (N. Y.) 66; 33 N. Y. App. Div. 231; 43 N. Y. App. Div. 386; 48 N. Y. App. Div. 359; 24 Barb. (N. Y.) 395; 37 Barb. (N. Y.) 601; 42 Barb. (N. Y.) 651; 4 Den. (N. Y.) 392; 1 Hall (N. Y.) 191; 6 Hun (N. Y.) 71; 91 Hun (N. Y.) 236; 14 Johns. (N. Y.) 238; 3 Sandf. (N. Y.) 161; 3 T. & C. (N. Y.) 304. Welland Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, and First Baptist Church *v.* Rapalee, 16 Wend. (N. Y.) 605, can no longer be considered law); Bank of Circleville *v.* Renick, 15 Oh. 322; Lucas *v.* Greenville Ass'n, 22 Oh. St. 339; Hagerman *v.* Ohio Ass'n, 25 Oh. St. 186; Washington Ass'n *v.* Stanley, 38 Ore. 319, 327; Dyer *v.* Walker, 40 Pa. St. 157; Spahr *v.* Farmers' Bank, 94 Pa. St. 429; Providence Co. *v.* Murphy, 8 R. I. 131; Merriman *v.* Magiveny, 12 Heisk. (Tenn.) 494; Singer Co. *v.* Bennett, 28 W. Va. 16; Bon Aqua Co. *v.* Standard Co., 34 W. Va. 764; Gilman *v.* Druse, 111 Wis. 400; Chubb *v.* Upton, 95 U. S. 665; Andes *v.* Ely, 158 U. S. 312, 322 (to same effect, 110 Fed. Rep. 845; 113 Fed. Rep. 398; 118 Fed. Rep. 190; 28 Fed. Cas. 839). See also West Winsted Bank *v.* Ford, 27 Conn. 282; Imboden *v.* Etowah Co., 70 Ga. 86, 107; Blanc *v.* Germania Bank, 114 La. 739; Chester Glass Co. *v.* Dewey, 16 Mass. 94, 101; Quincy Canal *v.* Newcomb, 7 Met. (Mass.) 276, 282; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; Appleton Co. *v.* Jesser, 5 Allen (Mass.) 446; Augur Co. *v.* Whittier, 117 Mass. 451, 455; Williamsburg Co. *v.* Frothingham, 122 Mass. 391; Provident Institution *v.* Burnham, 128 Mass. 458; Mann *v.* Williams, 143 Mass. 394; Chase's Co. *v.* Boston Co., 152 Mass. 428; Kansas City Co. *v.* Hunt, 57 Mo. 126; Johnston Co. *v.* Clark, 30 Minn. 308; Fayetteville Co. *v.* Tillinghast, 119 N. C. 343 (lease); Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368 (preferred creditor); Central Co. *v.* Clayes, 21 Vt. 30. *Cf.* Card *v.* Moore, 68 N. Y. App. Div. 327; aff. 173 N. Y. 598.

But there may be considerations of public policy so strong that they overcome the considerations of fairness between the parties. See Jones *v.* Aspen Hardware Co., 21 Colo. 263.

On conveyances to a *de facto* corporation, see second paragraph of note 22.

On an action in tort, where "its necessary basis is in the rights of a passenger, by virtue of the contract," see Pinkerton *v.* Pennsylvania Co., 193 Pa. St. 229, 234.

If A contracts with the associates as a corporation, A cannot, because of their lack of authority to act as a corporation, hold the associates personally liable for a breach of the contract. Sniders' Co. *v.* Troy, 91 Ala. 224; Cory *v.* Lee, 93 Ala. 468; Owensboro Co. *v.* Bliss, 132 Ala. 253; Humphreys *v.* Mooney, 5 Colo. 282; Stafford Bank *v.* Palmer, 47 Conn. 443; Canfield *v.* Gregory, 66 Conn. 9, 17; Planters' Bank *v.* Padgett, 69 Ga. 159; Doty *v.* Patterson, 155 Ind. 60; Trowbridge *v.* Scudder, 11 Cush. (Mass.) 83; Merchants Bank *v.* Stone, 38 Mich. 779; American Co. *v.* Bulkley, 107 Mich. 447; Love *v.* Ramsey, 139 Mich. 47; Finnegan *v.* Noerenberg, 52 Minn. 239; Johnson *v.* Okerstrom, 70 Minn. 303 (distinguishing Johnson *v.* Corser, 34 Minn. 355); Richards *v.* Minnesota Bank, 75 Minn. 196; Kleckner *v.* Turk, 45 Neb. 176; Hogue *v.* Capital Bank, 47 Neb. 929 (commenting on earlier cases and statutes); Larned *v.* Beal, 65 N. H. 184; Stout *v.* Zulick, 48 N. J. L. 599; Vanneman *v.* Young, 52 N. J. L. 403; Whitford *v.* Laidler, 94 N. Y. 145, 151 (see also Central Bank *v.* Walker, 66 N. Y. 424; but *cf.* Fuller *v.* Rowe, 57 N. Y. 23); Rowland *v.* Meader Co., 38 Oh. St. 269; Mason *v.* Stevens, 16 S. D. 320; Shields *v.* Clifton Co., 94 Tenn. 123; Tennessee Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn.); American Co. *v.* Heidenheimer, 80 Tex. 344; Clausen *v.* Head, 110 Wis. 405 (see also 32 Wis. 162; but *cf.* Bergeron *v.* Hobbs, 96 Wis. 641, and 64 Fed. Rep. 90). See also Clark *v.* Richardson, 31 S. W. Rep. (Ky.) 878; Laflin Co. *v.* Sinsheimer, 46 Md. 315; First Bank

courts from applying the same doctrine between the parties, is a question beyond the limits of this article.[34]

In summary.

1. When the existence of a corporation is only collaterally in issue, proof of facts sufficient to satisfy the requirements of the *de facto* doctrine is sufficient to make a *primâ facie* case.

2. If a corporation is in existence, but there is a ground upon which the state might have its existence forfeited, no one but the state can take advantage of this cause of forfeiture.

3. Most failures to conform strictly to statutory provisions regarding the formation and regulation of corporations are not fatal to the formation of a *de jure* corporation. But failure to perform an act, the performance of which the legislature has intended to be a condition precedent to incorporation, is necessarily fatal.

4. There are considerations of public policy so urgent as to justify the courts in holding that a *de facto* corporation may be a conduit of title.

5. The *de facto* doctrine has a very important scope in cases where contracts have been made on a corporate basis.

6. If associates who have not the corporate privilege assume to exercise it, there is no established doctrine that all but the

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v. Almy, 117 Mass. 476; Gow *v.* Collin Co., 109 Mich. 45; National Bank *v.* Rockefeller, 195 Mo. 15; Second Bank *v.* Hall, 35 Oh. St. 158; Wentz *v.* Lowe, 3 Atl. Rep. 878 (Pa.); Cochran *v.* Arnold, 58 Pa. St. 399; Whitney *v.* Wyman, 101 U. S. 392. *Contra*, Garnett *v.* Richardson, 35 Ark. 144; Bigelow *v.* Gregory, 73 Ill. 197; Kaiser *v.* Lawrence Bank, 56 Ia. 104; Williams *v.* Hewitt, 47 La. Ann. 1076; Sentell *v.* Rives, 48 La. Ann. 1214; Hurt *v.* Salisbury, 55 Mo. 310; Ferris *v.* Thaw, 72 Mo. 446 (but *cf.* Granby Co. *v.* Richards, 95 Mo. 106, and National Bank *v.* Rockefeller, 195 Mo. 15).

But if persons who assume corporate powers without complying with the statutory provisions are, by statute, expressly subjected to individual liability on all contracts made in the name of the alleged corporation, then the creditor may hold such persons to liability, for otherwise the statutory provision would be nugatory. Loverin *v.* McLaughlin, 161 Ill. 417, 434 (*cf.* 83 Ill. App. 643). To the same effect, on a similar statute, are Eisfeld *v.* Kenworth, 50 Ia. 389; Marshall *v.* Harris, 55 Ia. 182; Clegg *v.* Hamilton Co., 61 Ia. 121; Heuer *v.* Carmichael, 82 Ia. 288 (*cf.* Bank of Davenport *v.* Davies, 43 Ia. 424, followed in Jessup *v.* Carnegie, 80 N. Y. 441); Sweney *v.* Talcott, 85 Ia. 103; Thornton *v.* Balcom, 85 Ia. 198. And see Stokes *v.* Findlay, 4 McCrary (U. S.) 205.

If A deals with the associates as partners, and thereafter the associates are legally incorporated, but continue to deal with A without giving him notice of the incorporation, they are liable as partners. Perkins *v.* Rouss, 78 Miss. 343; Martin *v.* Fewell, 79 Mo. 401, 412; McGowan *v.* American Co., 121 U. S. 575.

[34] See note 13.

state must submit. It is not proper to apply to such a case the doctrine that the existence of a corporation cannot be attacked collaterally.

7. The *de facto* doctrine should be applied with caution when it is invoked for the benefit of the associates themselves against persons who have not dealt with them as a corporation. It is anomalous to permit the usurper of a right to require a stranger to submit to the assertion of such right.

8. It is anomalous to bridge a legal gap, even for the benefit of a person who has made an expenditure in good faith.

9. There may be no objection to applying the doctrine for the benefit of the associates themselves against strangers, if the associates are asserting a right which is in them either as natural persons or as a corporation.

10. The doctrine should never be applied for the benefit of the associates themselves to the prejudice of an innocent stranger.

Edward H. Warren.